RECORD, CASE NO. 14020.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 337.

T. B. NEEDLES, UNITED STATES MARSHAL AT MUSCOGEE, INDIAN TERRITORY, AND W. S. HISEY, JAILOR, APPELLANTS,

vs.

BENJAMIN BROWN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS.

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1 *Petition for writ of habeas corpus.*

Benj. Brown, petitioner, T. B. Needles, respondents, and W. S. Hisey, jailor.

To the Hon. I. C. Parker, judge of the circuit and district courts of the United States of America for the western district of Arkansas.

Your petitioner, the undersigned, Benj. Brown, states that on the 1st day of June, A. D. 1889, an information was filed against him by the United States attorney for the Indian Territory, in the United States court for said Territory, charging him with assault on one R. H. Bousted, who is alleged in said information to be a United States citizen, by shooting at the said R. H. Bousted and divers other citizens, not naming them.

That afterwards, to wit, that on the 11th day of September, A. D. 1889, he was put upon his trial for said offense, in said United States court for said Territory, and found guilty thereof.

That afterwards, to wit, on the same day he was sentenced by said United States court to imprisonment in jail at Muskogee, Ind. Territory, for the term and period of one year, and to pay a fine of one hundred dollars.

That the copies of said information and sentence are hereunto attached and made a part hereof, to which reference is made.

That after his said trial he filed a motion for a new trial, and a
2 motion in arrest of judgment in said case upon the grounds that said United States court for said Territory had no jurisdiction of said case. The said information containing such allegation charges said Ben Brown with the crime of assault to kill. If it charges any offense under the statutes, of which assault with intent to kill, said United States court for said Territory had and has no jurisdiction; both of which said motions were overruled and your petitioner was remanded to jail to serve out the sentence aforesaid. That he is now incarcerated in said jail by virture of said sentence, and is restrained of his liberty illegally by the respondents, T. B. Needles and W. S. Hisey.

That he is thus held in imprisonment contrary to the law and Constitution of the United States, and in violation of his personal liberty.

Wherefore your petitioner, Benj. Brown, prays the honorable judge of said court to grant to him the writ of habeas corpus, that he may be brought before your honor to be dealt with in accordance to law.

THOMAS MARCUM,
M. M. EDMINSTON,
Attorneys for defendant.

3 UNITED STATES OF AMERICA,
Creek Nation, Ind. Ter., ss:

Benj. Brown, on oath, deposes and says that he is the above-named prisoner; that he has heard read the above and foregoing petition, and knows the contents thereof, and the same is true as he verily believes.

BEN. BROWN.

Subscribed and sworn to before me this day of September, A. D. 188 .

[SEAL.]

W. NELSON,
Clerk of the U. S. Court.

STATE OF ARKANSAS,
Sebastian County, ss:

M. M. Edmiston, being duly sworn, deposes and says he is attorney for above petitioner, and has no interest in this other than that of attorney; that he knows the contents of the above complaint and the matter therein and true as he verily believes.

M. M. EDMISTON.

Subscribed and sworn to before me this 22nd day of September, 1889.
STEPHEN WHEELER, *Clerk.*

4 In the United States court for the Indian Territory.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* BENJ. BROWN, DEFENDANT. } Information for assault with a deadly weapon.

UNITED STATES OF AMERICA,
Indian Territory, ss:

At the special June term of the United States court for the Indian Territory, comes Z. T. Waldron, attorney for the United States for said court, and informs the court that as appears upon a complaint, under oath now placed on file herewith, one Benj. Brown, who is not an Indian, late of the Territory aforesaid, heretofore, to wit, on or about the first day of June, A. D. 1889, within the Indian Territory aforesaid, at a place under the exclusive and sole jurisdiction of the United States, unlawfully did then and there, on or about the day and year last aforesaid, assault the person of one R. H. Bousted, a citizen of the United States, in peace then and there being, with force and arms and with a revolving pistol, a deadly weapon, commonly called a revolver, loaded or charged with cartridges containing gunpowder and leaden balls, and of the caliber of No. .45, in the said defendant's hands then and there held, and discharged divers times at and against said compla'nant and divers
5 other citizens, with intent to do him, the complainant, and them bodily injury without provocation; and in an abandoned and malignant manner, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Z. T. WALDRON,
U. S. Attorney.

I, William Nelson, clerk of the United States court for the Indian Territory, hereby certify that the foregoing is a full and true and correct copy of the information in the above cause, as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Muskogee, in said Indian Territory, this 19th day of September, A. D. 1889.

[SEAL.]

WM. NELSON,
Clerk U. S. Court.
By W. R. SHACKLEFORD,
Deputy.

Filed 15th day June, 1889.

6 In the United States court of the Indian Territory, September term, 1889.

WEDNESDAY MORNING, NINE O'CLOCK,
September 11, *A. D.* 1889.

Court met pursuant to adjournment. Present, the Hon. James M. Shackleford, judge of the United States court for the Indian Territory.

No. 30. Information for assault with deadly weapon in the Indian country.

UNITED STATES
versus
BENJAMIN BROWN.

On motion of Zachary T. Walroud, esq., attorney for the United States court for the Indian Territory, the said defendant, Benjamin Brown, was brought to the bar of the court in custody of the marshal of said court, and it being demanded of him what he has to, or can, say why the sentence of the law upon him of guilty, heretofore returned against him by the jury in this cause, on the 11th day of September, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Benjamin Brown, for his crime aforesaid, be imprisoned in the Muskogee jail, situated at Muskogee, in the Indian Territory, for the term and period of twelve months, and that he pay to the United States of America a fine of one hundred dollars, together with all their costs in and about this prosecution laid out and expended, and that he stand committed to imprisonment in said jail until said fine and costs are paid, and that they have execution therefor.

It is further considered, that the marshal of *the* this court, to whose custody the said Benjamin Brown is now here committed, is hereby required to receive and safely keep and convey the body of the said Benjamin Brown hence to said jail in the Indian Terrritory without delay, and deliver him to the custody of the keeper of said jail, who is hereby required to receive and safely keep the said Benjamin Brown in jail, in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid. And it is further ordered that the clerk of this court is hereby required to furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said jail, and the other returned by the marshal to this court with a full and true account of the execution of the same.

I, William Nelson, clerk of the United States court for the Indian Territory, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above entitled cause, as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Muscogee, in said Indian Territory, this 19th day of September, A. D. 1889.

[SEAL.] WM. NELSON,
Clerk.
By W. R. SHACKLEFORD,
Deputy Clerk.

7 Received at the the United States jail at Fort Smith, Arkansas, this day of , A. D. 18 , from , marshal of the United States for the western district of Arkansas, the body of the within named , together with a copy of this writ.

I certify that I have served the within writ by delivering the body of the within named , together with a copy of this writ, into the custody and hands of the United States jailer at Fort Smith, in the State of Arkansas, on the day , 18 , and have his receipt therefor endorsed hereon, as within I am commanded.

United States marshal for western district of Arkansas.

(Indorsed:) United States versus Benjamin Brown. Certified copy of judgment.

8 In the United States circuit court for the western district of Arkansas.

Ex parte Benjamin Brown. In re application for writ of habeas corpus.

Plea to jurisdiction.

Now comes the said W. S. Hisey, jailer, and T. B. Needles, marshal, and for response to the petition of M. M. Edmiston, esqr., herein filed, saith that the said court here ought not further to take cognizance of, or sustain action aforesaid, because they say that the honorable circuit court above named has not the power to take cognizance of the imprisonment of the said Benj. Brown, for that the said circuit court, nor any justice or judge thereof, have any appellate powers over any party in prison under sentence of the U. S. court for the Indian Territory; wherefore they pray that this cause be dismissed.

Z. T. WALROUD,
Att'y for U. S. Court Indian Ter'y, for the respondents.

Filed Oct. 1, '89.

9 In the district court of the U. S. for the western district of Arkansas, Aug't term, 1889.

TUESDAY MORNING, 8½ O'CLOCK, *Oct. 1st, A. D.* 1889.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte Ben Brown. Petition for writ of habeas corpus.

On this day come the petitioner, Benj. Brown, by M. M. Edmiston, esqr., and Wm. H. H. Clayton, esqr., U. S. attorney for the western district of Arkansas, and come the respondents, W. S. Hisey, jailer, and T. B. Needles, U. S. marshal for the Indian Territory, by Z. T. Walroud, esqr., U. S. attorney for the Indian Territory, and this cause coming on to be heard, the said respondents, in response to rule to show cause why a writ of habeas corpus should not issue against them in this cause, file plea to jurisdiction of this court herein, which was by the court, after due consideration, overruled; to which the said respondents at the time excepted, and also file transcript of the trial of said Benj. Brown by the U. S. court at Muskogee.

10 In United States circuit court for western district of Arkansas.

In re Benj. Brown. Answer.

Now come W. S. Hisey, jailor, and certifies to the honorable court that the true cause of the detention of the said Benjamin Brown is a warrant of commitment delivered unto him with the said prisoner, a true copy whereof is hereto attached and made a part hereof, marked A, and that he is the keeper of the prison or jail at Muskogee, in the Indian Territory.

Wherefore your respondent prays that he be no further required to answer in the premises and that no writ issue against him.

W. S. HISEY, *Jailor.*

Subscribed and sworn to before me this 30th day of September, A. D. 1889.

[SEAL.] WM. NELSON,
Clerk of District Court of said Territory,
By WM. SHACKLEFORD, *Dep'ty.*

Filed Oct. 1, '89.

11 In the United States court for the Indian Territory, Sept. term, 1889.

MORNING, ——— O'CLOCK, *September* 11, *A. D.* 1889.

Court met pursuant to adjournment. Present, the Hon. James M. Shackleford, judge of the United States court for the Indian Territory.

UNITED STATES *versus* BENJAMIN BROWN. } No. 30. Indictment for assault with a deadly weapon with intent to do bodily harm, in the Indian country.

On motion of Zachary T. Walrond the said defendant, Benjamin Brown, was brought to the bar of the court in custody of the marshal of said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned against him by the jury in this cause on the 11th day of September, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen and by the court well and sufficiently understood, it is considered by the court that the said Benjamin Brown, for his crime aforesaid, be imprisoned in the United States jail at Muscogee, situated at Muskogee, in the Indian Territory, for the term and period of twelve months, and that he pay to the United States of America a fine of one hundred dollars, together with all their costs in and about this prosecution laid out and expended, and that he stand committed to imprisonment in said jail until said fine and costs be paid, and that they have execution therefor.

It is further considered that the marshal of this court, to whose custody the said Benjamin Brown is now here committed, is hereby required to receive and safely keep and convey the body of the said Benjamin Brown hence to said jail in the Indian Territory, without delay, and deliver him to the custody of the keeper of said jail, who is hereby required to receive and safely keep the said Benjamin Brown in jail, in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid. And it is further ordered that the clerk of this court is hereby required to furnish the marshal of this district with two duly certified copies of this judgment, sentence, and order, one of which shall be delivered to the keeper of said jail and the other returned by the marshal to this court, with a full and true account of the execution of the same.

I, William Nelson, clerk of the United States court for the Indian Territory, hereby certify that the foregoing is a true and correct copy of the judgment, sentence, and order in the above-entitled cause as the same appears of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Muscogee, in said Indian Territory, this 11 day of September, A. D. 1889.

[L. S.] WILLIAM NELSON, *Clerk.*
By , *Deputy Clerk.*

12 Received at the U. S. prison at Muscogee jail, at Muscogee, Indian Territory, this 11 day of September, A. D. 1889, from T. B. Needles, marshal of the , the body of the within-named Benjamin Brown, together with a copy of this writ.

W. S. HISEY, *Jailor.*

I certify that I have served the within writ by delivering the body of the within named Benjamin Brown, together with a copy of this writ, into the custody and hands of the warden of the Muskogee jail, at Muskogee, in the Indian Territory, on the 11 day of September, 1889, and have his receipt therefor endorsed hereon, as within I am commanded.

T. B. NEEDLES,
United States Marshal for Western District of Arkansas.

(Indorsed:) United States versus Benjamin Brown. Mittimus.

13 Be it remembered that at the called June session, A. D. 1889, of the United States court for the Indian Territory, begun and held at the court-house, in the town of Muscogee, in said Indian Territory, on the 3rd day of June, A. D. 1889, there were present the honorable James M. Shackleford, judge of said court, presiding; Wm. Nelson, esqr., clerk of said court; Thos. B. Needles, esq., marshal of said court, and Zackery

T. Waldrond, esq., United States attorney for said court; that on the 16th day of June, A. D. 1889, the same being the 12th judicial day of said term of said court, the following, among other proceedings were had:

UNITED STATES
vs.
BENJAMIN BROWN. } No. 30.

On this day comes the United of America, by Z. T. Waldroud, esqr., attorney for the United States, and files information against the defendant herein.

That afterwards, to wit: That on the 17th day of June, A. D. 1889, the same being the 13th judicial day of said term of said court, the following proceedings were had in said cause:

14 UNITED STATES
vs.
BENJ. BROWN. } Application for witness.

On this day comes the defendant, by his attorneys, and files his application in writing, verified upon oath, praying for witnesses in his behalf, at the expense of the United States of America, said application coming on to be heard, and the court, being fully advised in the premises, doth allow the same.

It is therefore ordered that the legal expenses of procuring the testamony of Albert Love and Andy Colbert, in behalf of said defendant, be paid by the United States of America, and that a subpœna be issued for them, returnable to the September term, 1889, of this court.

And afterwards, to wit, on said 17th day of June, 1889, of said court, the same being the 13th judicial day of said special session of said court, the following further proceedings were had in said cause:

UNITED STATES
vs.
BENJAMIN BROWN. } Continuance.

15 It is ordered by the court that this cause be, and the same is hereby, continued until the next (September) term of this court.

Be it remembered that at the regular September term, A. D. 1889, of the United States court for the Indian Territory, begun and holden at the court-house in the town of Muscogee, in said Indian Territory, on the 2d day of September, A. D. 1889, there were present the honorable James M. Shackleford, judge of said court, presiding, William Nelson, esq., clerk of said court, Thomas B. Needles, esq., marshal of said court, and Zackey T. Walroud, esq., United States attorney for said court.

That on the 11th day of September, A. D. 1889, the same being the 9th judicial day of said court, the following proceedings were had in said cause, to wit:

UNITED STATES
vs.
BENJAMIN BROWN. } 30. Arraignment and plea of not guilty.

On this day comes the United States of America by Z. T. Walroud, esq., attorney for the United States, and the defendant also comes in his

own proper person, and by his attorneys, and jointly having had hearing of the information herein, and it being demanded of him concern-
16 ing said information above specified and charged upon him, here he would acquit himself thereof—he says he is not guilty as charged in said information, and puts himself upon the country, and the parties announce themselves ready for trial, and therefore comes a jury, to wit, W. M. Culbertson, W. B. Rogers, R. D. Burton, Albert Morris, Noah Whitenhurst, A. M. Lawson, A. G. Lee, A. B. Davis, Joseph Cobb, Frank Morgan, G. B. Hester, C. J. Phemis, twelve good and lawful men, competent and qualified to serve as jurors in this case under the laws of the United States, and the jury was duly empanelled and sworn in the presence of the defendant, Benjamin Brown, and there not being sufficient time to try said cause the court instructed the jury not to talk about the case themselves, nor to suffer others to talk about case to them or in their presence, and court arose until two o'clock p. m.

That afterwards, to wit, on the said 11th day of September, A.D. 1889, the same being the 9th judicial day of said term of said court, the following further proceedings were had in said cause:

UNITED STATES
vs. } 30. Information for assault with a deadly weapon.
BENJAMIN BROWN.

And now comes the United States of America, by Z. T. Wal-
17 roud, esq., attorney for the United States, and the defendant also comes in his own proper person and by his attorneys, and the jury also comes, to wit, W. M. Culbertson, W. B. Rogers, R. D. Burton, Alfred Morris, Noah Whistenhurst, A. M. Lawson, A. G. Lee, A. B. Davis, Joseph Cobb, Frank Morgan, G. B. Hester, C. J. Phemis, and the jury, after hearing the evidence and argument of counsel and receiving the instructions of the court, retired, under the charge of a sworn baliff, to debate on their verdict.

And afterwards, on said 11th day of September, A. D. 1889, the same being the 9th judicial day of said term session of said court, the following further proceedings were had in said cause, to wit:

UNITED STATES
vs. } 30. Information for assault with a deadly weapon.
BENJAMIN BROWN.

The jury having agreed upon a verdict and returned into open court by their ba'liff, the defendant being present in person and by attorney, and the jurors each responded to their names, return the following verdict, to wit: "In the United States court for the Indian Territory, United States of America, plaintiff, *vs.* Benjamin Brown, defendant, verdict:
We, the jury empanelled and sworn in the above entitled action,
18 do find from the law and evidence the above named defendant guilty as charged.

G. B. HESTER,
Foreman.

And afterward, to wit, on the said 11th day of September, A. D. 1889, the same being the 9th judicial day of said term of said court, the following further proceedings were had in said cause.

19 UNITED STATES *versus* BENJAMIN BROWN. } No. 30. Information for assault with deadly weapon in the Indian country.

On motion of Zachery T. Walroud, esq., attorney for the United States court for the Indian Territory, the said defendant, Benjamin Brown, was brought to the bar of the court in custody of the marshal of said court, and it being demanded of him what he has to or can say why the sentence of the law upon him of guilty heretofore returned against him by the jury in this cause on the 11th day of September, A. D. 1889, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said:

Whereupon the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said Benjamin Brown for his crime aforesaid, be imprisoned in Muscogee jail situated at Muscogee in the Indian Territory, for the term and period of twelve months, and that he pay to the United States of America a fine of one hundred dollars, together with all their costs in and about this prosecution laid out and expended, and that he stand committed to imprisonment in said jail until said fine and costs are paid, and that they have execution therefor.

It is further considered that the marshal of this court, in whose custody the said Benjamin Brown is now here committed, is hereby required to receive and safely keep and convey the body of the said Benjamin Brown hence to said jail in the Indian Territory without delay, and deliver him to the custody of the keeper of said jail, who is hereby required to receive and safely keep the said Benjamin Brown in jail in execution of the sentence aforesaid, and in conformity with the same, for the full period of time aforesaid. And it is further ordered that the clerk of this court is hereby required to furnish the marshal of this district with two duly certified copies of this judgment, sentence and order, one of which shall be delivered to the keeper of said jail, and the other returned by the marshal to this court, with a full and true account of the execution of the same.

of Arkansas, hereby certify that the foregoing is a true and correct copy of the judgment, sentence and order in the above-entitled cause, as the same appears of record.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Fort Smith, in said district, this day of , A. D. 18 .

Clerk.

By *Deputy Clerk.*

20 Received at the United States jail, at Fort Smith, Arkansas, this day of A. D. 18 , from , marshal of the United States for the western district of Arkansas, the body of the within named , together with a copy of this writ.

I certify that I have served the within writ by delivering the body of the within named , together with a copy of this writ, into the

custody and hands of the United States jailer at Fort Smith, in the State of Arkansas, on the day of , 18 , and have his receipt therefor endorsed hereon, as within I am commanded.

United States Marshal for Western District of Arkansas.

(Indorsed:) United States versus , mittimus.

21 And afterwards, to wit, on the 18th day of September, the same being the 15th judicial day of said court, the following further proceedings were had in said cause:

UNITED STATES
vs. } 30.
BENJAMIN BROWN.

On this day comes the defendant, by his attorney herein, and files his motion for a new trial herein, and affidavit in support of same.

And afterwards, on said 18th day of September, A. D. 1889, the same being the 15th judicial day of said term of said court, the following further proceedings were had in said cause:

UNITED STATES
vs. } 30.
BENJAMIN BROWN.

On this day comes the defendant herein, by his attorneys, and files his motion in arrest of judgment herein.

And afterwards, to-wit, on the 19th day of September, A. D. 1889, the same being the 16th judicial day of said term of said court, the following further proceedings were had in said cause, to wit:

22 UNITED STATES
vs. } 30.
BENJAMIN BROWN.

On this day come the parties, the United States of America, by Z. T. Walroud, esq., U. S. att'y, and the defendant in his own proper person and by his attorneys, and the motion for a new trial heretofore filed in this cause coming on to be heard, and the court being sufficiently advised in the premises, doth overrule the same.

And afterwards, on the said 19th day of September, the same being the 16th judicial day of said term of said court, the following further proceedings were had in said cause:

UNITED STATES
vs. } 30.
BENJAMIN BROWN.

On this day come the parties, the United States of America, by Z. T. Walroud, esq., attorney for the United States, and the defendant in his own proper person and by his attorneys, and the motion in arrest of judgment heretofore filed in this cause coming on to be heard, and the court being sufficiently advised in the premises, doth overrule the same.

23 UNITED STATES OF AMERICA,
Indian Territory, ss:

I, William Nelson, clerk of the United States court for the Indian Territory, do hereby certify that the above and foregoing is a full, true, and complete transcript of the journal entries in the records of the United States court for the Indian Territory, as the same appears from the records in my office.

Witness my hand and the seal of said court hereon impressed this 30th day of September, A. D. 1889.

[SEAL.] WM. NELSON, *Clerk.*

24 In the circuit court of the U. S. for the western district of Arkansas, August term, 1889.

WEDNESDAY MORNING, 8½ O'CLOCK, *Sept.* 25, *A. D.* 1889.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte, Benjamin Brown. Petition for writ of habeas corpus.

The petitioner, Benjamin Brown, by his attorneys, Thos. Marcum & M. M. Edmiston, esq., having presented to this court a petition for a writ of habeas corpus on the ground that he is restrained of his liberty by W. S. Hisey, U. S. jailer, and T. B. Needles, U. S. marshal at Muscogee, Indian Territory, contrary to the Constitution and laws of the United States,

It is ordered by the court here that a rule issue against the said W. S. Hisey, jailer, and T. B. Needles, marshal as aforesaid, to appear in this court on Tuesday, Oct. 1st, 1889, to show cause why such writ of habeas corpus should not be issued in this cause, and it is further ordered that the clerk of this court notify the judge and district attorney of the U. S. court at Muscogee of the action of this court herein.

25 UNITED STATES OF AMERICA,
Western district of Arkansas.
In the circuit court of said district.

To T. B. Needles, esq., United States marshal for the Indian Territory, and W. S. Hisey, jailer of said court at Muscogee, Indian Territory:

It having been alleged, by a petition filed before said court by M. M. Edmiston, an attorney for Benj. Brown, in behalf of said Benjamin Brown, said petition being duly sworn to by said Edmiston, that said Benjamin Brown is now by you and each of you unlawfully restrained of his liberty; that he is deprived of his liberty by you and each of you without due process of law and contrary to the Constitution and laws of the United States.

You are therefore commanded by the United States circuit court for the western district of Ark., that the body of Benj. Brown, held and kept in custody unlawfully by you, as it is alleged, and now in your custody, be by you produced before the circuit c't for the western district of Arkansas at the U. S. court-house at Ft. Smith, Arkansas, on the 21st day of October, A. D. 1889, at the hour of two o'clock, p. m., to do and to re-

ceive what then and there shall be considered by said court in relation
26 to the imprisonment of the said Benj. Brown and you then and there appear before said court to show cause of the alleged illegal imprisonment of the said Benj. Brown, and you will have then and there this writ and your action thereon.

Issued by order of the United States circuit court for the western district of Arkansas this 14th day of Oct., A. D. 1889.

(Signed:) I. C. PARKER,
U. S. District Judge, presiding in the U. S. Circuit Court.

27 In the district court of the U. S. for the western district of Arkansas, August term, 1889.

WEDNESDAY MORNING, 8 O'CLOCK,
Oct. 23, A. D. 1889.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte Benj. Brown.

Petition for writ of habeas corpus.

The above-entitled cause came on for final hearing on the petition for the writ and exhibits to the same, and all the facts in the case, together with the return to the writ of habeas corpus, and it having appeared to the satisfaction of the court that the petitioner, Benj. Brown, is now held in custody by Hon. T. B. Needles, U. S. marshal for the U. S. court at Muscogee, and W. S. Hisey, U. S. jailer at Muscogee, and that the U. S. court at Muscogee was without jurisdiction to try said Benj. Brown for the crime of assault with intent to kill, and that therefore the judgement of said court sentencing said Benj. Brown to a term of imprisonment in the U. S. jail at Muscogee is void, and that the commettment, by virtue of which the said T. B. Needles, U. S. marshal, and W. S. Hisey, jailer, hold in prison the said Benj. Brown, was issued without authority of law. That it appears to the court that the said Benjamin Brown is held in custody and restrained of his liberty contrary to the Constitution and
28 *and* laws of the United States by the said T. B. Needles and W. S. Hisey,

It is therefore ordered, that the said T. B. Needles and W. S. Hisey forthwith discharge from custody the said Benj. Brown, and make report of such fact to this court.

29 In the district court of the U. S. for the western district of Arkansas, Nov. term, 1889.

THURSDAY MORNING, 8 O'CLOCK, *Jan'y 9th, A. D.* 1890.

Court met pursuant to adjournment. Present, the Hon. Isaac C. Parker, judge of the district court of the United States for the western district of Arkansas.

Ex parte Benj. Brown. Petition for writ of habeas corpus.

It is therefore hereby ordered, that the said T. B. Needles and W. S. Hisey forthwith discharge the said Benj. Brown on his personal recognizance in the sum of five hundred dollars for his appearance in this court on the 5th day of May, 1890, to answer to the charge of an assault with intent to kill.

Whereas the foregoing order was made on October 25th, 1889, and omitted to be entered of record of said date, it is hereby ordered that the same be entered now as for then.

Now comes the respondants, T. B. Needles and W. S. Hisey, and pray an appeal from the decision of this court to the Supreme Court of the United States, which is by the court granted.

30 I, Stephen Wheeler, clerk of the circuit court of the United States in and for the western district of Arkansas, hereby certify that the foregoing is a true and correct transcript of the record and papers on file in said case.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Fort Smith, in said district, this 1 day of Feb'y, A. D. 189 .

[SEAL.] STEPHEN WHEELER, *Clerk*,
By I. M. DODGE, *D. C.*

(Indorsement on cover:) No. 337. T. B. Needles, U. S. marshal, at Muscogee Indian Territory, and W. S. Hisey, jailor, appellants, vs. Benjamin Brown. W. Arkansas, C. C. U. S. 14020. Filed April 23, 1890.

154 US 511

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No.

EX PARTE NEW ORLEANS AND NORTH EASTERN RAILROAD COMPANY AND NEW ORLEANS AND SOUTHERN RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EDGAR H. FARRAR,
B. F. JONAS,
E. B. KRUTTSCHNITT,
HARRY H. HALL,
Counsel for Petitioners.

T. H. Thomason, Print, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No.

EX PARTE NEW ORLEANS AND NORTH EASTERN RAILROAD COMPANY AND NEW ORLEANS AND SOUTHERN RAILROAD COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Justices of the Supreme Court of the United States of America:

Your petitioners, the New Orleans and North Eastern Railroad Company and the New Orleans and Southern Railroad Company, respectfully show unto your Honors as follows:

That your petitioners are citizens of the State of Louisiana, being corporations created by and existing under the laws of said State, having their principal offices in the City of New Orleans, in said State.

That your petitioner, the New Orleans and North

Eastern Railroad Company, operates a line of railroad from the City of New Orleans to Meridian, in the State of Mississippi, where it connects with the Alabama Great Southern Railroad.

That your petitioner, the New Orleans and Southern Railroad Company, operates a line of railroad from the City of New Orleans through the Parishes of Orleans, St. Bernard and Plaquemine to Point-a-la-Hache, in the Parish of Plaquemine.

That on the 2d day of February, 1893, one Oscar C. Thomas, a citizen of the State of Alabama, filed an action at law against your petitioners in the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana, claiming from them *in solido* twenty-five thousand dollars damages for personal injuries received by him from the collision of two trains, one belonging to the New Orleans and North Eastern Railroad Company, and the other belonging to the New Orleans and Southern Railroad Company; said collision having occurred at a point where the two lines of railroad cross, in the City of New Orleans; and the said collision being charged to be due to the joint fault and negligence of the employees of both Companies.

That in his said petition he set up, that on the 2d day of November, 1892, he shipped from Epes, Alabama, over the Alabama Great Southern Railroad Company, and its connecting lines, one lot of calves and cows, to New Orleans, Louisiana, under what is known

as a "Live Stock Contract." That by the terms of his contract he was required to take all proper care of said stock, and for that purpose he travelled on the same train with the said stock from Epes, Alabama, over the lines of Alabama Great Southern and New Orleans and North Eastern Railroad Company.

That on the 3d of November, 1892, the cars containing his cattle were transferred from the New Orleans and North Eastern Railroad Company to the New Orleans and Southern Railroad, for the purpose of transporting them to the Slaughterhouse, the point of destination in the City of New Orleans.

That when the cars containing his cattle, and upon which he was also riding, as he was bound to do under his contract, were moving on the track of the New Orleans and Southern Railroad Company, on the way to the Slaughterhouse, at the intersection of St. Claude and Press streets, where the tracks of the New Orleans and North Eastern Railroad Company, and the New Orleans and Southern Railroad Company cross each other at right angles, a locomotive of the New Orleans and North Eastern Railroad Company ran into the cars containing the cattle of petitioner, derailed them, injured his cattle, and threw the petitioner to the ground, causing him great bodily and mental pains, for the treatment of which he was taken to the Charity Hospital. That petitioner was painfully, seriously and dangerously injured by the violence with which he was thrown to the ground; all the

ligaments of his foot being ruptured, and that on the advice of his physicians [illegible] he would be a cripple for life.

That the collision of the locomotive of the New Orleans and North Eastern Railroad with the cars of the New Orleans and Southern Railroad Company at the time and place above specified, was owing to the gross and wanton carelessness of the employees of the two Companies.

Your petitioners further show that to this petition the New Orleans and Northeastern Railroad Company appeared, and admitted that the plaintiff had made a contract of carriage from Epses, Ala., to New Orleans, Louisiana, over the Alabama Great Southern Railroad Company and the New Orleans and North Eastern Railroad Company; that the said contract of carriage was terminated and completed by the delivery of the cattle in New Orleans to the New Orleans and Southern Railroad Company.

That the said cattle were not transferred to the slaughterhouse, which is situated in the Parish of St. Bernard, and not in the Parish of Orleans, under the contract set out in the plaintiff's petition.

That under the contract with the New Orleans and Southern Railroad Company, by which the said cattle were conveyed a few miles between the City of New Orleans and the slaughterhouse, plaintiff was not required to load, unload, feed, water, and take all proper care of said stock. That he was not required to travel

said short distance with his cattle, but should have proceeded to the slaughterhouse in a street car, which is the usual method of conveyance employed to ride to the slaughterhouse.

That the New Orleans and Southern Railroad Company, in conveying cattle from the City of New Orleans to the slaughterhouse, made no provision for transportation of passengers, being either owners of cattle, or others, there being, by way of the street railroads of the City, prompt and easy access to the slaughterhouse.

That in riding on top of one of the cattle cars, the plaintiff was guilty of contributory negligence, without which he would not have sustained any injury, and respondent specially pleaded contributory negligence as a defense to the right of the plaintiff to recover.

That your petitioner, the New Orleans and Southern Railroad Company, appeared and specially denied any contract between itself and the plaintiff, but averred that, under a contract with it and the New Orleans and North Eastern Railroad Company, it did agree to switch certain car loads of cattle a distance of one or two miles from the junction of the New Orleans and Southern Railroad Company with the New Orleans and North Eastern Railroad Company to the slaughterhouse, in the Parish of St. Bernard.

That the plaintiff had no right to, and was not required to travel with said cattle, but should have

traveled between the City of New Orleans and the slaughterhouse, in a street car, which is the usual method of conveyance employed in New Orleans to ride to the slaughterhouse.

That plaintiff had no right to travel with his cattle, nor in, or about the cattle cars. That the defendant made no preparation for the transportation of the plaintiff, in or about the cattle cars, and that the plaintiff in travelling on top of one of the said cars, acted in direct violation of the rules and regulations of the defendant Company, and was guilty of gross contributory negligence, without which he would not have sustained such injuries; and respondents specially pleaded contributory negligence as a defense to his right of recovery.

Your petitioners further aver that all parties went to trial before the Court and a jury on these issues.

That on the said trial the following facts were established, with no conflict of evidence with reference thereto.

The plaintiff shipped two car loads of cattle from Epes, Alabama, to the City of New Orleans, consigned to himself in the City of New Orleans. The contract was what is known as a "cattle contract," special in its nature, whereby, in consideration of a special rate of $53 per car, guaranteed by the Alabama Great Southern Railroad Company, between the point of shipment and New Orleans, Louisiana, the shipper agreed to load, unload, feed, water and take all proper

care of the stock, and to insure the railroad Company, and all connecting lines through which the stock may pass between the point of shipment and the point of destination, against all loss or damage which might be incurred by delays in transportation, or delivery, or arising out of its responsibility as master over its agents or servants (gross and wanton neligence excepted), growing out of this shipment.

Under this contract, it was implied that the shipper should travel with his cattle from the point of shipment to the City of New Orleans, on the lines of railroad between the point of shipment and point of destination in the City of New Orleans.

In accordance with the stipulation contained in said contract, to load, unload, water, feed and take care of his cattle, the plaintiff, no fare being demanded of him, traveled on the train to the City of New Orleans. The train which conveyed the cattle was a freight train, to which was attached a caboose, in which the plaintiff rode. The cars of cattle were, in due course, conveyed to the terminus of the New Orleans and North Eastern Railroad Company, in the City of New Orleans, into its yards at said terminus, where its cattle pens are situated, and where all of its trains are broken up. When the said train reached the said yards the train was broken up and the caboose was taken off; and, the plaintiff's cattle being intended by him to be transported to the slaughter-house (which is situated in the Parish of St. Bernard,

about two and a half miles from the crossing of the New Orleans and North Eastern Railroad Company and the New Orleans and Southern Railroad Company, which cross each other at right angles at the corner of St. Claude and Press Streets, in said City of New Orleans, about two blocks distant from the yards where said train was broken up), they were, at the request of his commission merchant, switched over from the New Orleans and North Eastern Railroad yards to the line of the New Orleans and Southern Railroad, and there delivered to the New Orleans and Southern Railroad for transportation to the slaughterhouse. This delivery of these cars by the New Orleans and North Eastern Railroad to the New Orleans and Southern Railroad Company took place under an arrangement between the two railroads, whereby the New Orleans and Southern Railroad Company agreed, for and in consideration of the sum of three dollars, which was paid by the shipper in addition to the $53 stipulated in the special contract of transportation from Epes, Ala., to New Orleans, to transport all cars from the terminus aforesaid to the cattle pens of the slaughterhouse, whenever the cattle were intended by the shipper to be delivered at the slaughterhouse.

Of these three dollars the New Orleans and Southern Railroad received two dollars, and the New Orleans and North Eastern Railroad Company received one dollar.

When said caboose was taken off in the yard of the New Orleans and North Eastern Railroad Company, and the train on which he traveled from Epes, Ala., to New Orleans was broken up, the plaintiff got on top of one of the said three cattle cars so switched over (the car he got on top of not being one of his own cars), and he remained on top of the said car while the same was being so switched over to the New Orleans and Southern Railroad line, and he remained on top of the said car while the New Orleans and Southern Railroad was transporting the same on its own line to the slaughterhouse; and while he was in that position, the said train of the New Orleans and Southern Railroad Company came in collision with a train of the New Orleans and North Eastern Railroad, at the crossing of the two roads aforesaid, the said collision being due to the fact that neither of the said trains stopped before reaching the crossing, and failed to give the necessary signals before undertaking to cross.

By said collision the car on which the plaintiff was riding was overthrown. The plaintiff was thrown to the ground, and his ankle injured.

If the plaintiff had been on either one of his own cars, instead of upon a car of the train which was not his, he would not have been injured.

Plaintiff admitted that he knew that the top of a cattle car was a dangerous place.

The plaintiff got on the top of this cattle car with

the permission of the train men of the New Orleans and North Eastern Railroad, and remained on top of this cattle car without any objection or remonstrance of the train men of the New Orleans and Southern Railroad Company, during the switching aforesaid.

On previous occasions, when the plaintiff had shipped cars to New Orleans, and had them switched down to the Slaughterhouse, he had also, when he so desired, gotten on top of the cars without any remonstrance of the train men of the New Orleans and Southern Railroad, and ridden to the Slaughterhouse.

Through the yards of the New Orleans and North Eastern Railroad Company, about seven blocks away from the point where the train on which the plaintiff had come from Alabama was broken up, and the caboose taken off, there was a line of street cars going to the Slaughterhouse, upon which the fare was five cents, and three blocks further away there was another line of street cars, also going to the Slaughterhouse, all of which lines of street railroads were known to the plaintiff who was accustomed to travel on them between the City and the Slaughterhouse, and by which he could have reached the Slaughterhouse in about thirty-five minutes.

With the exception of plaintiff's desire to remain with his cattle to see them properly unloaded and delivered at the slaughterhouse, and to avoid walking a distance of seven blocks to the street car Slaughterhouse, there was no necessity for him to ride on top of a cattle car,

there being no necessity to water or feed them between the City and the cattle pens of the slaughterhouse.

The New Orleans and Southern Railroad Company was no party to the contract of carriage, between the plaintiff and the Alabama Great Southern Railroad and its connections, for the transportation of the plaintiff's cars between Epes, Alabama, and the City of New Orleans, and received no part of the price of said carriage, and had no contract with the plaintiff other than that represented by the three dollar switching contract, which sum was collected by the New Orleans and North Eastern Railroad Company, who receipted for it when the cattle were delivered at the slaughterhouse.

In October, 1891, prior to the occurrences of this case, knowledge came to the officials of the New Orleans and Southern Railroad Company that boys and other persons occasionally rode down from the depot of that Company to the slaughterhouse on the roof of cattle cars, and thereupon a peremptory order, in writing, was issued to all employees of the Company prohibiting anyone, except employees of the Company, to be upon any of their cattle trains without a written permit from the freight agent, Mr. Long, who was also superintendent of the depot. This order was posted in the depot as a notice to the public.

The plaintiff never asked for nor obtained permission from Mr. Long, nor from any of the officials of

the Company for permission to ride on top of the cattle cars.

He never made any inquiries as to what the rules and regulations of the Company were, and had no actual knowledge of the issuance of the order.

The cattle train of the New Orleans and Southern Railroad had on it no caboose, and no provision was made for the carrying of passengers.

The plaintiff neither paid, nor tendered any fare to the New Orleans and Southern Railroad Company, nor to any of its officials or employees for so riding upon the said cattle cars. No fare had been demanded of him on previous occasions when he had ridden on on top of these cattle cars, and on such previous occasions he had paid no such fare.

And your petitioners further aver, that all of the facts in this case being entirely undisputed, your petitioners requested the trial Judge to take the case away from the jury, and to charge them to find a verdict for the defendants on the ground, that the undisputed facts of the case showed, that the plaintiff was guilty of contributory negligence, and could not therefore recover; which charge the Court refused, and to which refusal of the Court, these defendants took a timely bill of exceptions, and attached to and made part of that bill of exceptions all the evidence adduced and documents filed in the case.

That to the charges given by the Court to the jury, and to the charges which your petitioners requested

the Court to give to the jury, and which the Court refused or modified in such a manner as to eviscerate the charges asked, these defendants took at the time and properly reserved ten other and different bills of exceptions, making in all eleven bills of exceptions to the charge of the court below.

That each and every one of these exceptions, as appears by reference thereto, involved a different proposition of law, and each one of them was material and necessary to the proper consideration of the cause by the jury.

That the jury brought in a verdict in favor of the plaintiff, and against these petitioners, for seven thousand dollars damages, and on which verdict the Court entered judgment.

That petitioners asked for a new trial, which was refused, and thereupon your petitioners prosecuted their writ of error from the verdict and judgment to the United States Circuit Court of Appeals for the Fifth Circuit, assigning twelve material errors in the charge of the court below, based on the eleven bills of exceptions aforesaid; where the said cause came on for hearing, and, after argument, said Court, through two of its Judges, or a majority thereof, rendered a judgment affirming the judgment of the Circuit Court. From this judgment of the majority of the Court, the Hon. Don A. Pardee, senior Justice of the Court, dissented.

That your petitioners thereupon petitioned the said

Court for a rehearing of the said cause, which rehearing the said Court refused, and that said Court is about to send down its mandate, directing the execution of the said verdict and judgment against your petitioners, to their irreparable damage and injury.

That your petitioners file herewith a certified copy of the record of said cause in the said Circuit Court of Appeals for the Fifth Circuit, bearing the number 156 on the docket of said Court; and your petitioners annex hereto and make part hereof the opinion of the majority of the Court and the dissenting opinion of Judge Pardee.

That an inspection of the opinion of the majority of said Court shows that the same is grossly erroneous, and amounts to a total denial of justice to your petitioners in the following particulars:

I.

In holding broadly that "whether there was negligence on the one part, or contributory negligence on the other, is a question of fact to be determined by the jury under proper instructions from the Court," and in applying that misstatement of the law to a case where the conceded and undisputed facts show that the plaintiff was guilty of contributory negligence *per se* in voluntarily assuming a place of danger, known by him to be such, upon a train upon which he was not a passenger, and where he was present in direct violation of the rules and regulations of the Company.

Your petitioners aver, that the opinion of the Circuit Court of Appeals, in this case, on said point, shows that said Court has virtually abdicated its functions as a court of law, under the Constitution of the United States, and attempted to establish in the Fifth Circuit a jurisprudence in violation of the jurisprudence laid down by this Honorable Court, whereby the right and duty of a court is denied to take a case away from a jury, and to charge it to find a verdict for the plaintiff or the defendant, in a case where the facts are undisputed, and where fair minded men cannot differ as to the inferences to be drawn from those facts.

And your petitioners aver, that by the Seventh Amendment to the Constitution of the United States, your petitioners were entitled in this case to a trial by jury, according to the rules of the Common Law, and that according to the rules of the Common Law, a trial by jury means:

First. A submission of the facts to the jury, where there are facts to be found, and a submission to the jury of the admitted facts, for the purpose of determining the lawful inferences to be drawn from those facts where fair-minded men may differ as to what the inferences are which should be drawn from the admitted facts. *Second.* The finding of the law applicable to the facts by the Court, and the charging by the Court of the law correctly to the jury. And, *Third.* The directing of the jury to find a verdict in all cases where, in the opinion of the Court, as a matter of law,

the evidence is insufficient to justify a verdict, or where the facts, and the inferences therefrom are undisputed, and there remains nothing but a question of law for decision.

II.

That the said Court committed a gross and grievous error against your petitioners by refusing to take up, discuss and decide twelve material assignments of error, which your petitioners had lawfully, under the statutes of the United States and rules of the Court, assigned for the consideration of the said Circuit Court of Appeals for the Fifth Circuit; and in attempting to evade the duty imposed upon them, of taking up and discussing the said twelve material assignments of error, by finding that "the point of all, and each of the said eleven bills of exceptions (upon which the said assignments were based), is that the trial Judge erred in not instructing the jury, as a matter of law, that the defendant in error was guilty of contributory negligence and could not recover."

That this finding of the Court, in its said opinion, that all of the said bills of exceptions presented only that one point is utterly untrue in point of fact, and in point of law, as clearly appears by the bare inspection of the bills of exceptions themselves. That the only bill of exceptions which raised the question, that it was the duty of the Court to take this case away from the jury, and to charge the jury to find a verdict for the defendants, was the first bill of exceptions.

That the second bill of exceptions was to a modification made by the Court to a charge requested by the defendants, pertaining to the relation between the plaintiff, Oscar C. Thomas, and one of the defendants, the New Orleans and Southern Railroad Company, during the time that the said Thomas was on its train; it being claimed by your petitioners that the modification of the said charge raised a question that was not presented in the pleadings, was not justified by the facts, was misleading to the jury, and erroneous in law.

That the third bill of exceptions was taken to a modification by the Court to a charge requested by the defendants relative to a duty imposed upon the plaintiff, Oscar C. Thomas, to find out, and know, what the rules and regulations of the New Orleans and Southern Railroad were relative to people riding upon its cattle cars, and seeking to charge Thomas with the duty of inquiring about such rules and regulations, and to charge him with notice of the fact that he was upon the top of said cattle car in violation of the rules and regulations of the said Company, it being claimed by the defendants that the modification of this charge by the Court was contrary to the issue raised in the pleadings, was misleading to the jury, and was erroneous in point of law.

That the fourth bill of exceptions was to the refusal of the Court to charge the jury as to what was obliga-

sons riding on top of its cattle cars, and charging the jury that under certain conditions of fact the notice did not in law affect the question of the plaintiff's negligence, or his right to recover.

The defendants claiming that this charge to the jury was not justified by the facts, was misleading, and was erroneous in point of law.

And your petitioners aver, that the sweeping away of all of their material assignments of error, by the grossly untrue and erroneous finding, made by the majority of the Circuit Court aforesaid, amounts to a denial of justice by the said Court to your petitioners, and the deprivation of their legal rights as litigants in the said Court; and that your petititioners have no other remedy, save to crave this Honorable Court to exercise its supervisory jurisdiction over the judgment of the said Circuit Court of Appeals for the Fifth Circuit, by means of the Writ of Certiorari.

Your petitioners therefore pray, that a Writ of Certiorari may issue to the said United States Circuit Court of Appeals for the Fifth Circuit, to bring up for review before your Honors, the judgment and decree of said Court, and that until this Court can hear and pass upon the said Writ of Certiorari, your Honors will issue an order directing the said Court to stay its mandate, and to hold the same subject to the orders and decrees of this Honorable Court.

And your petitioners pray, that on the hearing of the said Writ of Certiorari, so to be issued, the judgment

and decree of the said United States Circuit Court of Appeals for the Fifth Circuit, be quashed and reversed, and that your petitioners may have such further and other relief in the premises, as law and justice may require.

EDGAR H. FARRAR,
B. F. JONAS,
E. B. KRUTTSCHNITT,
HARRY H. HALL,
Counsel for Petitioners.

STATE OF LOUISIANA,
Parish of Orleans.

Personally came and appeared before me, the undersigned authority, John Glynn, Jr., who being duly sworn, deposes and says, that he is resident general agent of the New Orleans and North Eastern Railroad Company, and also George S. Taylor, who being duly sworn, deposes and says, that he is resident general agent of the New Orleans and Southern Railroad Company, petitioners in the above petition, and that all the facts and matters and things set forth therein are true to the best of their knowledge, information and belief.

Sworn to and subscribed before me this 24th day of March, 1894.

(Signed) JOHN GLYNN, JR.,
[SEAL] GEO. S. TAYLOR,
HEWES T. GURLEY,
Notary Public.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.
November, Term, 1893.

New Orleans and North Eastern Railroad Company, and the New Orleans and Southern Railroad Company, Plaintiffs in Error. *vs.* Oscar C. Thomas, Defendant in Error.	No. 156.

Error to the United States Circuit Court, Eastern District of Louisiana.

Before PARDEE and MCCORMICK, Circuit Judges, and LOCKE, District Judge.

MCCORMICK, Judge, delivered the opinion of the Court.

The defendant in error, a citizen of Alabama, brought this action in the Circuit Court for the Eastern District of Louisiana, against the plaintiffs in error, corporations created under the laws of Louisiana, claiming damages for personal injuries alleged to have been inflicted on him by their negligence. He charged that he had shipped two car loads of cattle from Epes, Alabama, to New Orleans, over the Alabama and Great Southern Railroad and its con-

necting lines under what is known as a live stock contract; that by the terms of his contract he was required to load, unload, feed, water, and take all proper care of said stock, and for that purpose he traveled on the same train with the stock from Epes to New Orleans, over the lines of the Alabama and Great Southern Railroad, the New Orleans and North Eastern Railroad Company, and the New Orleans and Southern Railroad Company; that the cars containing his cattle were transferred from the New Orleans and North Eastern Railroad Company to the New Orleans and Southern Railroad Company for the purpose of transporting them to the slaughterhouse, the point of destination in New Orleans; that while moving on the track of the New Orleans and Southern Railroad Company, and at a point where that track is crossed at right angles by the track of the New Orleans and North Eastern Railroad Company, a locomotive of the latter Company ran into the cars containing his cattle, and on which he was riding, derailed said cars and severely injured him; that said collision resulted from the gross negligence of the employees of the plaintiffs in error. The New Orleans and North Eastern Railroad Company, besides the general issue, avers that its contract for carriage terminated at the point where the transfer of the cars was made to the track of its co-plaintiff in error; that under the contract, between

plaintiffs in error, to convey said cars from New Orleans to the slaughterhouse, the defendant was not required to load, unload, feed, water, and care for said stock, and was not required to travel with his cattle that short distance, but should have taken a street car, which is the usual method of conveyance employed to reach the slaughterhouse; that no provision had been made by the New Orleans and Southern Railroad Company for the transportation of passengers, cattle-owners, or others, from New Orleans to the slaughterhouse, and that defendant in error was guilty of contributory negligence in riding on the cattle cars in question.

The New Orleans and Southern Railroad Company besides the general issue denies that it had any contract with the defendant in error, and avers that under a contract between it and the New Orleans and North Eastern Railroad Company it did switch certain car loads of cattle a distance of only one or two miles from the junction of its track with that of its co-plaintiff in error to the slaughterhouse; that the defendant in error was not required to travel with said cattle, and had no right to do so, in or about said cattle cars, that it had made no provision for the transportation of the defendant in error in or about said cattle cars, and that he in riding on said cars acted in direct violation of the rules of this Company, and was guilty of

gross contributory negligence, which contributory negligence it specially pleads as a defense to the action.

There was a verdict and judgment against the plaintiffs in error, to review which this writ of error was sued out.

There are thirteen assignments of error, twelve of which rest on bills of exception taken to the refusal of requested charges, the modification of requested charges given and to certain portions of the general charge of the trial Judge to the jury. These bills of exception cover seventy-five pages of the printed record. The first of these bills of exception, and the basis of the first assignment of error, purports to embrace all the evidence admitted on the trial, and on which the plaintiff in error asked the trial Court to instruct the jury peremptorily to find a verdict for the defendants (below, plaintiffs in error) on the ground that on the facts disclosed by the evidence, there was nothing left in the case but questions of law, and that it appeared from the facts, as a matter of law, that the plaintiff (below, defendant in error), was guilty of contributory negligence, and could not recover. This the trial Court refused, and the plaintiffs in error now urge that the Circuit Court erred in refusing to take this case from the jury. It can hardly escape observation that, in the judgment

of the very able counsel who generally represent parties of the class of these plaintiffs in error, the error here complained of is one into which the Judges of the Circuit Court often fall.

The second bill of exceptions refers to the facts shown in the first bill, makes a fair argumentative statement of what the evidence tended to prove, on the basis of which plaintiffs in error asked a charge, which the Court gave, but gave with this addition:

"But if the jury find that the defendants, by their conduct, had held out their employees to the plaintiff as authorized to consent to his being carried on the train with his cattle, and such employees consented, then there will be a consent of the corporation themselves."

The plaintiffs in error urge that the Circuit Court erred in thus modifying their requested charge.

The bills of exception from 3 to 12, inclusive, each refers to the facts as shown in bills numbered 1 and 2, and the point of all and of each is, that the trial Judge erred in not instructing the jury, as matter of law, that the defendant in error was guilty of contributory negligence, and could not recover. We are constrained to hold that the provision of our Constitution which gives parties to an action at law the right to a trial by jury embraces even parties who bring actions at law against railroad corporations, and that the per-

sistent effort to push precedents to the point of requiring trial Judges to decide as questions of law the issues most commonly joined in cases where recovery for personal injuries is sought, should not be encouraged.

The varying language of the swelling current of reported opinions which already deluges the assizes can be so collected and directed against almost any conditions of proof possible in such cases as to convert the questions as to what is negligence and what is contributory negligence into issues of law instead of fact. While in our view the authority of adjudged cases is, that whether there was negligence on the one part or contributory negligence on the other, is a question of fact to be determined by the jury under proper instructions. It is, of course, elementary that whether there is any evidence is a question of law. But we must beware that in applying this rule we do not substitute the judgment of the Judge that there is not sufficient evidence for his judgment that there is no evidence. In this case the trial Court was not even asked to charge the jury that there was no evidence to charge plaintiffs in error with negligence, but on an issue on which they had the burden of proof the trial Judge asked to charge as matter of law that they had made out their case.

We do not feel called on to review the evidence in this case as we would on an appeal from a decree in

equity, and deem it only necessary to say that in our view the proof in this case justified the trial Judge in refusing to take the whole case away from the jury, and in modifying the requested charges that he gave and in refusing those he refused. And that the part of the general charge excepted to presents no error for which the case should be reversed.

The following cases support this opinion:

Richmond & Danville Railroad vs. Powers, 149 U. S. 43.

Delaware & Lackawanna Railroad vs. Converse, 139 U. S. 469.

Washington and Georgetown Railroad Company vs. McDade, 135 U. S. 554, and cases therein cited.

Railroad Company vs. Stout, 84 U. S. 657.

Washington and Georgetown Railroad Company vs. Harmons, Administrator, 147 U. S. 571.

Kane vs. Northern Central Railway, 128 U. S. 91.

Aerkfetz vs. Humphreys, 145 U. S. 418.

Indianapolis and St. Louis Railroad Company vs. Horst, 93 U. S. 291.

Grand Trunk Railway vs. Ives, 144 U. S. 408.

Eddy vs. Wallace, C. C. A. Rep., Vol. 1, 435.

The judgment of the Circuit Court is affirmed.

A true copy:

Attest, J. M. McKee, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT.
November Term, 1893.

New Orleans and North Eastern Railroad Company, and
New Orleans and Southern Railroad Company, Plaintiffs in Error,
vs.
Oscar Thomas, Defendant in Error.
} No. 156.

Error to the United States Circuit Court, Eastern District of Louisiana.

PARDEE, Circuit Judge:

I respectfully dissent from all that part of the opinion of the Court which deals with the case. The whole evidence in the case is brought up in a somewhat lengthy bill of exceptions, and all the bills of exception cover seventy-five and a half printed pages of the transcript, but the evidence is not conflicting on the main points involved, nor are the bills of exception unnecessarily prolix.

The evidence shows without dispute these facts, shortly stated:

The plaintiff in the court below shipped two car loads of cattle over the Alabama Great Southern Railroad and its connections from Epes, Alabama, to New

Orleans, under a special contract, requiring him to load, unload, feed and water his cattle, etc., and impliedly giving him transportation on the same train with his cattle. The contract was performed and plaintiff and his cattle were safely brought over the Alabama and Great Southern Railroad and its connection, the New Orleans and North Eastern Railroad, to the terminus of the latter in the City of New Orleans. When the plaintiff with his cattle reached New Orleans, his agents gave directions to have the cars switched to the Slaughterhouse in the Parish of St. Bernard. Whereupon the Southern Railroad Company, under a general contract it had with the New Orleans and North Eastern Railroad Company covering the switching of cars over the tracks of both Companies, undertook the switching of plaintiff's two cars and one other cattle car to the Slaughterhouse.

The plaintiff, who had travelled in the caboose on the cattle train in coming to New Orleans, at the suggestion of the train hands of the North Eastern Railroad, and with the acquiescence of the train hands of the Southern Railroad, climbed with his satchel on top of one of the cattle cars to ride to the Slaughterhouse. The train of three cattle cars, with no accommodations or provisions for passengers, was backed rapidly out of the North Eastern yards, but when crossing the track of the North Eastern road was run into by an-

other train, also backing on the main track; the car on which plaintiff was, was thrown over, upset, and the plaintiff thrown off, severely spraining his ankle.

The Southern Railroad Company had, by written notice issued to its employees, and posted in its depot where it transacted business with the public, forbidden all persons—except the employees—from riding on the cattle trains without an express permission from the Freight Agent, which it is not contended plaintiff had. The plaintiff and others, in cases of former shipments of cattle over the same route, had, with the consent of train hands, ridden on top of cattle cars when the same was switched by the Southern Railroad Company to the slaughterhouse, and plaintiff testified he knew it was a dangerous place to ride. There was no necessity for the plaintiff to ride on the cattle cars to the slaughterhouse, as the distance was short and plaintiff's cattle were not to be loaded or unloaded, fed or watered en route, and besides there was a line of street cars which furnished the usual conveyance to and from the slaughterhouse. There was no evidence showing by whose or what negligence the collision occurred. The only conflicting evidence is with regard to the extent of the plaintiff's injuries. The question in the case is whether, under the facts of the case, the plaintiff was guilty of contributory negligence, and the answer depends on whether

the consent of the train hands of the Southern Railroad Company, on the occasion plaintiff was injured, and on previous occasions, that the plaintiff should ride on the top of cattle cars while they were being switched, in spite of the orders of the Company forbidding such riding, was sufficient to establish a usage such as would justify the plaintiff in so riding on the top of the cattle cars, although he knew it was dangerous, and to make him a passenger of the Company, although otherwise he was a stranger, if not a trespasser.

The Circuit Court held in favor of the sufficiency of such consent to establish such usage, for although the question was apparently left to the jury, the charges of the Judge maintain the proposition in the clearest terms, and are otherwise meaningless and misleading; besides, as the evidence was entirely without conflict and undisputed on the point, there was nothing to be done by the jury but apply the law to the facts, and the refusal to direct a verdict for the defendants was practically directing a verdict for the plaintiff.

In generally discussing the respective duties of Judges and juries in cases of negligence, the opinion of this Court says:

"In this case, the trial Court was not even asked to charge the jury that there was no evidence to charge the plaintiff in error with negligence, but, on an issue

on which they had the burden of proof, the trial Judge was asked to charge, as matter of law, that they had made out their case."

I suppose that this statement refers to the request of the counsel for plaintiffs in error, as recited in the first bill of exceptions, to-wit:

"To find a verdict for the defendants, on the ground that on the facts declared by the said evidence there was nothing left in the case but questions of law, and that it appeared from the said facts, as a matter of law, that the plaintiff was guilty of contributory negligence, and could not recover."

Now, in the case of Railroad Company vs. Jones, 95 U. S. 439, which was a case where evidence was offered on both sides, and where the railroad company was guilty of negligence and the plaintiff was guilty of contributory negligence, the Supreme Court said:

"If the company had prayed the Court to direct the jury to return a verdict for the defendant, it would have been the duty of the Court to give such direction and error to refuse," citing respectable authorities in support thereof.

And in Railroad Company vs. Houston, 95 U. S. 697, a case where the negligence of the railroad company was admitted, but the contributory negligence of the plaintiff's wife, the person injured, was shown, the Supreme Court, after reciting evidence much more involved than the case in hand, said:

"Under these circumstances, the Court would not have erred had it instructed the jury as requested, to render a verdict for the defendant."

The true rule seems to be that when the plaintiff's evidence does not show contributory negligence, the burden of proving it is on the defendant (Railroad Company vs. Horst, 93 U. S. 291), but where contributory negligence is shown by undisputed evidence, whether offered by the plaintiff or the defendant, and such negligence will in law defeat a recovery by plaintiff, it is proper for the defendant to ask a peremptory instruction in his favor, and in such a case it is error on the part of the trial court to refuse.

The question raised by the first bill of exceptions is whether the evidence in the case shows such undisputed facts that, as a matter of law, the defendant was guilty of contributory negligence, and, as said above, this depends on the sufficiency of the usage proved.

Now it seems to me, for the Southern Railroad Company to be liable to the defendant in error for the injuries he received while riding on top of the cattle cars, a place which he says he knew to be dangerous, and while the cattle cars were being switched, it should appear that he was so on the cattle cars with the consent of the Southern Railroad Company, either expressed or implied, and without knowledge of the

danger and risk he assumed, or that there was a contract of carriage as to him with his cattle, while the cars were being switched, and no safer place was furnished him to travel. Neither is proven nor can be fairly inferred from the evidence in the case; on the contrary, it is proved, without contradiction, that the Southern Railroad Company had, by notice issued to its employees, and published in its depot where it transacted business with the public, expressly forbidden travel upon cattle cars on its route. It is true that there was evidence tending to show that the plaintiff had never seen this notice, and that on previous occasions he and others had traveled on cattle cars of the Southern Railroad Company to the Slaughterhouse while the same were being switched from the terminus of the North Eastern Railroad, with the consent and direction of train hands of the North Eastern Railroad Company, and, inferentially, with the knowledge of the train hands of the Southern Railroad Company, but I take it to be clear that it was not necessary for the plaintiff to see any such notice, for he was bound to know that without a contract of carriage, he had no right to be there; nor can the permission of train hands justify him, in the absence of a contract of carriage, in placing himself in a dangerous place, or in fact in any place on the cattle cars, for he was bound to know that such per-

mission was beyond the scope of their authority, and that he could only act on it at his peril.

That the plaintiff, by reason of having previously ridden on the cattle cars of the Southern Railroad Company in violation of the rules and orders of the Company, could have acquired the right to ride on top of the cattle cars of that Company at the time he was injured, is a proposition which, I think, for the first time gets judicial sanction in this case. As it appeared from the undisputed evidence that the defendant in error, plaintiff below, had no rights by contract or otherwise, to ride on the cattle cars while they were being switched by the Southern Railroad Company, and as he knew that so riding was dangerous, the proper application of the maxim *volenti fit non injuria* required an instruction of the Court to the jury directing a verdict for the defendant. In Railroad vs. Jones, *supra*, it is laid down as follows:

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation or doing what such a person under existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion. See Wharton on Negligence, section 1, and notes.

"One who by his negligence has brought an injury upon himself cannot recover damages for it. Such is

the rule of the Civil and of the Common Law. A plaintiff in such cases is entitled to no relief. But where the defendant has been guilty of negligence also, in the same connection, the result depends upon the facts. The question in such cases is: 1. Whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or, 2. Whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care or caution, that but for such negligence or want of care and caution on his part, the misfortune would not have happened.

"In the former case the plaintiff is entitled to recover. In the latter case he is not. Tuff vs. Warman, 5 C. B. n. s. 573; Butterfield vs. Forrester, 11 East. 58; Bridge vs. Grand Junction Railroad Co., 3 M. & W. 344; Davis vs. Mann, 10 *id.* 546; Clayards vs. Dethick, 12 C. B. 439; Van Lien vs. Scoville Manufacturing Co., 14 Abb. (N. Y.) Pr. n. s. 74; Ince vs. East Boston Ferry Co., 106 Mass. 149."

The third bill of exceptions is as follows:

"Be it remembered, that on the trial of this cause, on the 9th, 10th and 14th days of March, 1893, before the Hon. Edward C. Billings, United States District Judge, holding the Circuit Court, and a jury, on the issues of law and fact herein raised by the pleadings, and the facts being such as set forth in Bill of Exceptions Nos. 1 and 2, the counsel for the defendants then and there requested the Court to charge the jury as follows:

"That the plaintiff is a man of ordinary prudence and intelligence, was bound to know that a freight train, without accommodation for passengers, was not intended for the carriage of persons, and that he was bound to ascertain for himself before he started upon the New Orleans and Southern Railroad train with his cattle whether he had a right to be there or not; that he was bound to use reasonable diligence to find out what the rules and regulations of that Company were, and if the jury find that, by the use of such reasonable diligence, plaintiff could have found out that the rules of the Company prohibited the riding on the top of the cattle cars, then he is chargeable in law with knowledge of the rule, and they must find for the defendants.

"Which instruction the Court gave to the jury, but with the following amendment or modification:

"If the plaintiff had good reason to believe from his former dealings with the defendants, that it was intended by them that he, as the owner of the live stock, should go on top of the cattle car, then he was rightfully there."

"To which addition and modification the defendants' counsel then and there excepted, before the jury retired, and tenders this their bill of exceptions, which is duly allowed and signed accordingly."

It is assigned as error that the Court erred in adding to and modifying the instructions asked. It seems to me that the modification was unwarranted. If the plaintiff knew that the positive rules of the

defendant prohibited the riding on top of the cattle cars, he could have had "no good reason to believe, from former dealings, that it was intended that he, as owner of the cattle or otherwise, should go on top of the cattle car; and, therefore, the charge, with the additional modification, is misleading and erroneous."

The fourth bill of exceptions in the record is as follows:

"Be it remembered, that, on the trial of this cause, on the 9th, 10th and 14th days of March, 1893, before the Honorable Edward C. Billings, United States District Judge, holding the Circuit Court, and a jury, on the issues of law, such as set forth in bill of exceptions Nos. 1 and 2, the counsel for the defendants requested the Court to charge the jury as follows:

" 'That, if the jury find that the governing officials of the New Orleans and Southern Railroad did, in October, 1891, issue a general order in the following words:

" 'New Orleans and Southern Railroad Company,

" 'No. 34 St. Charles Street.

" 'J. A. Larned, President and General Manager.

" 'H. S. Bell, Secretary and Treasurer.

" 'Copy.

" 'NEW ORLEANS, La., Oct. 16, 1891.

" 'Paul Baker, Esq., Conductor:

" 'Dear sir—I am informed that boys and other parties occasionally ride down from our depot to the slaughterhouse on the roof of the cattle cars. This

must be stopped. Hereafter, no one, except the employees of the train, under any circumstances, will be allowed on our cattle trains without a written permit from the freight agent, Mr. Long.

" 'You will return with your reports to this office any permits for passage given by Mr. Long.

" 'Respectfully yours,

" '(Signed) H. S. BELL, Secretary.'

"Prohibiting all persons not its own employees, handling the train, from riding on top of cattle cars between the City of New Orleans and the slaughter-house without the written permission of the local agent, and that notice of this written order was given to said employes, and a copy of it was posted in its station at its depot in the City of New Orieans, where it transacted its business with shippers and passengers, then it was under no legal obligation to give any other or further notice to the public of such rule or regulation; and if the jury further find that the plaintiff was at the time of his injury riding on the top of a cattle car in violation of said general order, even though he was there with the permission of the train men, he was a trespasser on said car, and the Company owed him no duty except that of not wantonly injuring him; and if the jury further find that the plaintiff would not have been injured if he had not been on the roof of said cattle car, then, by being there under the above circumstances, he was guilty of contributory negligence and cannot recover."

"Which instruction the Court refused.

"To which refusal of the Court to give the said in-

struction, the defendant's counsel then and there excepted, before the jury retired, and tenders this their Bill of Exception, which is duly allowed and signed accordingly."

It is difficult to conceive what the Railroad Company could have done more than it did as recited in this bill to signify to the defendant in error that he was not authorized to ride on the top of cattle cars of the Southern Railroad Company. The argument seems to be that because the train hands permitted him to go upon the car, and did not peremptorily eject him as a trespasser, he hereby became a passenger, and the case seems to require that although he voluntarily—and as the evidence shows unnecessarily—put himself in a place known by him to be dangerous, yet when injured he can legally recover damages from the Railroad Company.

In my opinion the trial Court erred in refusing to instruct the jury to find for the defendants, in modifying the instruction asked, as given in the third bill of exceptions; and in refusing the instructions as to notice given in the fourth bill of exceptions; and that this Court errs in affirming the judgment of the trial Court.

A true copy:

Attest, J. M. McKee, Clerk.

SUPREME COURT OF THE U

October Term, 19

No.

EX PARTE NEW ORLEANS AND NO
ERN RAILROAD COMPANY, AND
ORLEANS AND SOUTHERN
COMPANY.

Petition for a Writ of Certiorari to the U
Circuit Court of Appeals for the Fifth

BRIEF IN BEHALF OF APPLICANTS FOR

EDGAR H. FARRAR,
ERNEST B. KRUTTSCH
BENJAMIN F. JONAS,
HARRY H. HALL,
Counsel for P

T. H. Thompson, Print, N. O.

SUPREME COURT OF THE UNITED STATES.

October Term, 1893.

No.

EX PARTE NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, AND THE NEW ORLEANS AND SOUTHERN RAILROAD COMPANY.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF IN BEHALF OF APPLICANTS FOR WRIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners have made application for leave to file a petition for a writ of *certiorari* directed to the United States Court of Appeals for the Fifth Circuit, asking this Honorable Court to order that Court to send up the record of case No. 56 on the Docket thereof, styled "The New Orleans and Northeastern Railroad Company, and the New Orleans and Southern Railroad

Company vs. Oscar C. Thomas," and asking an order restraining the sending down of the mandate in that case until this application can be heard.

The facts are fully set forth in the petition, and to that petition is annexed certified copies of the opinion of the Court in the Thomas case, together with the dissenting opinion of Judge Pardee.

There is also filed with the petition a certified copy of the whole record in the Circuit Court of Appeals.

The right and power of this Court to issue the writ is unquestioned. Section 5 of the Act of Congress, approved March 3d, 1891, gives this Court power, by *certiorari* or otherwise, to cause any record to be certified to it for review and determination, as if it had been brought here on appeal or writ of error.

In the first application that was made to this Court for such a writ your Honors held, that this branch of your jurisdiction should be exercised sparingly and with great caution. Lau-Ow-Beu, Petitioner, 141 U. S. 583.

In the second case in which application was made to this Court, *In re* Woods, 143 U. S. 202, this Court said, "that the power was given to it to order up any case in the interest of jurisprudence and uniformity of decision."

And the same remark was repeated by the Court in

the case of Columbus Watch Company vs. Robbins, 148 U. S. 269.

We are aware of the fact that this Court is averse to the issuance of writs of *certiorari*, and we recognize fully the principle stated by Chief Justice Gray in Farmington vs. County Commissioners, 112 Mass. 212, "that the granting of the writ in the first instance is not a matter of right and rests in the discretion of the Court, and that the writ will not be granted unless the petitioner satisfies the Court that substantial justice requires it."

We suppose it will be conceded that the writ which the Court has authority to issue under this section of the Statute is the common law writ of *certiorari*, performing the functions that such a writ usually performs in modern jurisprudence, and that this Court recognizes the general rule that the supervisory power of a superior over an inferior legal tribunal, by means of the common law writ of *certiorari*, extends not only to questions affecting the jurisdiction of the subordinate tribunal, but also to questions affecting the regularity of the proceedings and to errors of law affecting the rights of the parties.

Donohue vs. Will County, 100 Ill. 94.

McAlliley vs. Horton, 75 Alabama, 491.

State vs. Dodge County, 56 Wis. 79.

Compton vs. Block, 65 Alabama, 236.

People vs. Board of Police, 38 New York, 506.

Hyslop vs. Finch, 99 Ill. 171.

People vs. Betts, 55 New York, 600.

State ex rel. Hart vs. Common Council, 55 Northwestern Reporter, 113.

We believe that we have made in the petition in this case such a showing of gross error and departure from the settled rules of jurisprudence by the Circuit Court of Appeals for the Fifth Circuit, as to justify the interposition of this Court.

I.

We charge that the majority of the Circuit Court of Appeals, in their opinion, have virtually denied the petitioners right of trial by jury in a common law case, by abdicating their functions as a court of law, and by holding that the Circuit Judge, sitting as a trial Judge, could abdicate his functions as a Judge of the law in the case, by submitting a case to a jury where the facts were undisputed, and where there were no doubtful inferences to be drawn from the facts, and could in such a case lawfully refuse to take the case away from the jury and decide it as a matter of law.

We submit that the trial by jury guaranteed by the seventh amendment to the Constitution, means a trial by jury according to the rules of the common law; that according to such rules, the jury are the

judges of the facts, and, where doubtful inferences can be drawn from the facts, are judges of what inferences should be drawn; that the Court is, in such a case, the sole judge of the law; and that, therefore, when the facts are undisputed and the inferences from the facts are clear and without doubt and point all one way, there remains nothing left in the case but a question of law; and that it is the duty of the Court in such a case to take it away from the jury and to decide the question of law. We further contend that, where a court refuses to perform this duty and submits such a case to a jury, it is virtually abdicating its functions, and that the jury is made the judge not only of the fact, but of the law. Such a submission of damage suits against a corporation to a jury necessarily results on all occasions in a judgment for the plaintiff. This same remark was made by Chief Justice Earl in the case of Cotton vs. Wood, 8 C. B. (N. S.) p. 568.

If this is to be the jurisprudence of the Fifth Circuit, as established by the Court of Appeals, then every corporation which goes into that court as defendant in a damage suit, no matter how good its defense may be, or how clear the facts may be, proceeds to a judicial slaughter. If the jurisprudence is established against corporations it will necessarily be extended to individuals, and the result will be that juries in the

Fifth Circuit will be the judges of the law and the evidence in every case, even though there be nothing left in the case but a question of law, if the Court chooses to submit the case to the jury and refuses to perform its duty of deciding the law itself.

We suppose that this Court would not hesitate to issue a writ of *certiorari* to send up a record where the Circuit Court had held that it was the function of the Court to find the facts and the function of the jury to find the law, or where the Court had held that it was the function of the jury to find both the law and the facts. While it has not said that directly in this case it has virtually declared it to be the law by laying down the rule broadly, "that whether there was negligence on the one part, or contributory negligence on the other, it is a question of fact to be determined by the jury under proper instructions."

This statement of the law is true only as a general rule. It is true only where the facts are in dispute, or where, the facts being admitted, fair-minded persons may differ as to the inferences to be drawn from the facts. It is not the rule of law where the facts are undisputed, and where they all point one way, and where fair-minded persons cannot differ in the inferences to be drawn from them. In the latter case there is nothing to be left to the jury, and such a case imposes upon the court the duty of deciding as a matter

of law the question of negligence, or of contributory negligence. In the case at bar there was no question as to the negligence of the defendant Company. That was admitted. There was no point at issue except the question of the contributory negligence of the plaintiff, Thomas. The facts were entirely without dispute. The inferences from the facts were clear. Thomas voluntarily got on top of a cattle car, a place which he confessed he knew to be dangerous, on a train where he was not a passenger and had no right to be, where he was virtually a trespasser, and where he was riding in violation of the rules and regulations of the Company, on whose train he was riding. It was the clear duty of the Court to take such a case from the jury and to charge them as a matter of law that the plaintiff was guilty of contributory negligence and could not recover. The lower Judge refused so to charge; an exception was taken to his refusal and the whole evidence was brought up to the Circuit Court of Appeals. The majority of that Court,

, declared that the lower Judge was right, on the ground that, "whether there was negligence on the one part, or contributory negligence on the other, is a question of fact, to be determined by the jury under proper instructions from the Court."

After enunciating this error, the Court further declared:

"It is of course elementary, that whether there is any evidence is a question of law. But we must beware that in applying this rule we do not substitute the judgment of the Judge, that there is not sufficient evidence for his judgment that there is no evidence."

This further statement only aggravates the error, as it is the very opposite of the true rule given in Imp. Co. vs. Munson, 14 Wall. 498, quoted with approval by Justice Miller in Pleasant vs. Fant, 22 Wall. 120, and again by this Court in Bowditch vs. Boston, 101 U. S., p. 18.

Let us see if we are supported in the position we have taken by the authorities.

In Schuchard vs. Allens, 1 Wall. 369, this Court said:

"Where there is no dispute about facts, and the law arising upon them is conclusive against the right of the plaintiff to recover, it is proper for the Court so to instruct the jury. If the evidence be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly. 'This is equivalent to a demurrer to the evidence, and such an instruction ought to be given whenever the evidence is not legally sufficient to serve as the foundation of a verdict for the plaintiff' This practice 'has in many of the

States superseded the ancient practice of a demurrer to evidence. It answers the same purpose and should be tested by the same rule. A demurrer to evidence admits not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom.' "

The greater part of this statement is quoted by the Court from the decision in Parks vs. Ross, 11 How., p. 362.

In Bowditch vs. Boston, 101 U. S., p. 18, this Court said:

" It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered, the other party would be entitled to a new trial, it is the right and duty of the Judge to direct the jury to find according to the views of the Court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts and promotes the ends of justice.

Merchants' Bank vs. State Bank, 10 Wall, 637.

Improvement Company vs. Munson, 14 *Id.*, 442.

Pleasants vs. Fant, 22 *Id.*, 116.

The rule in the English Courts is substantially the same.

Ryder vs. Wombell, Law Rep., 4 Ex., 32.

Gibbin vs. McMullen, Law Rep., 2 P. C., 335.

In the latter case it was said: "In every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party introducing it, upon whom the onus of proof is imposed."

In the case of Meguire vs. Corwine, 101 U. S. 111, this Court said:

"A Judge has no right to submit a question where the state of the evidence forbids it."

The same rule had been laid down with equal rigor in cases where the question was one of negligence or contributory negligence.

In Randall vs. B. & O. R. R. Co., 109 U. S. 482, the lower court took the case as to defendants away from the jury; and in affirming the action of the court below, Mr. Justice Gray said:

"It is the settled law of this Court that when the evidence given at the trial, with all the inferences that the jury could justifiably draw from it, is insufficient to support the verdict for the plaintiff, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant. * * * And it has recently been decided by the House of Lords, upon

careful consideration of the previous cases in England, that it is for the Judge to say whether any facts have been established from which negligence can be reasonably and legitimately inferred; and it is for the jury to say whether, from those facts, when submitted to them, negligence ought to be inferred. Metropolitan R. R. Co. vs. Jackson, 3 Appeal Cases, 193."

In Railroad Company vs. Houston, 95 U. S. 697, and in Railroad Company vs. Jones, *Ibidem*, 443, this Court said, that the lower court ought to have charged the jury to find for the Railroad Companies on the contributory negligence of the plaintiff, as shown by the undisputed facts; and reversed the judgment against the Railroad Companies.

In Schofield vs. Chicago & St. Paul R. R. Co., 144 U. S. 615, where Judge McCrary took a case away from the jury on the question of contributory negligence, this Court affirmed his action as in conformity with the rule above quoted from Bowditch vs. Boston, and Randall vs. B. & O. Railroad Company.

In Steamship Company vs. Martin, 133 U. S. 375, this Court reversed the judgment below on the ground that the Court ought to have charged the jury, as a matter of law on the facts, to find for the defendant.

In Mitchell vs. The New York, Lake Erie and Western Railroad Co., 146 U. S. 513, this Court approved a charge to the jury to find for the defendant

on the ground that there was not sufficient evidence to justify a recovery.

In the case of Elliott vs. The Chicago, Milwaukee, etc., Railway Company, 150 U. S. 245, this Court approved a ruling of the trial court that the plaintiff was guilty of contributory negligence, and used these words: "We are of the opinion that the deceased was guilty of contributory negligence, such as to bar a recovery. It is true that the questions of negligence and contributory negligence are ordinarily questions of fact, to be passed upon by a jury; yet when the undisputed evidence is so conclusive that the Court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict."

In the case of Gardner vs. The Michigan Central R. R. Co., 150 U. S., 349, this Court was of opinion that the court below erred in taking away the case from the jury because the facts in the case were in dispute.

Judge Thompson's statement of the rule in his work on Trials (p. 1667), has been commended by judicial authority (see Chicago, B. & Q. R. R. Co. vs. Landauer, 54 A. & E. R. R. Cases, p. 650) to be as clear and as accurate as any found in the books. He says:

"That the Judge is authorized to non-suit the plaintiff, or direct a verdict for the defendant, according to the mode of practice in the particular jurisdiction, in

either of the following cases: (1) Where all the facts which the plaintiff's evidence fairly tends to prove, if admitted to be true, would not authorize a conclusion that the defendant had been guilty of negligence as a matter of law; (2) Where either upon the plaintiff's evidence, assuming it to be true, or upon a state of facts shown by the evidence in the whole case which stand undisputed, and which ought not, therefore, to be left to the decision of the jury, an inference unavoidably arises that the person injured was guilty of negligence materially and directly contributing to produce the result."

This is the rule as laid down by all the authorities, English and American:

Jewell vs. Parr, 13 C. B., 916.

Toomey vs. London, B. & S. C. Ry. Co., 3 C. B. (N. S.) 150.

Dublin R. R. Co. vs. Slattery, L. R. 3 Appeal Cases, 1155.

Pittsburg R. R. Co. vs. Evans, 53 Pennsylvania State, 250.

Dascomb vs. Buffalo R. R. Co., 27 Barbour, 221.

Reading and C. R. R. Co. vs. Ritchie, 102 Pa. State, 425.

U. P. R. R. Co. vs. Adams, 19 A. and E. R. R. Cases, 376.

Orange R. R. Co. vs. Ward, 25 *Ibidem*, 359.

Rorer on Railroads, pp. 1054, 1055 and Notes.

It is only where "there is uncertainty as to the existence of either negligence or contributory negligence that the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because the facts, being undisputed, fair-minded men will honestly draw different conclusions from them."

Richmond & Danville R. R. Co. vs. Powers, 149 U. S., p. 45.

Kane vs. Central R'y Co., 128 U. S., 94.

Delaware, etc. R. R. Co. vs. Converse, 139 U. S., 469.

Railroad Co. vs. Stout, 17 Wall., 657.

Grand Trunk R'y Co. vs. Ives, 144 U. S., 417.

T. & P R'y Co. vs. Cox, 145 U. S., 606.

The opinion of the majority of the Circuit Court absolutely ignores all of this doctrine and refuses to apply it in a case where the facts require the doctrine to be applied.

It is impossible to read the Bills of Exception in this case, the dissenting opinion of Judge Pardee and to compare these with the opinion of the majority of the Court, without coming to the conclusion that the Court took this position advisedly, and with the intention of approving the action of all *nisi-prius* Judges in the Fifth Circuit who might refuse to take such cases away from a jury and to decide them as matters

of law. That this is no new departure on the part of the majority of the Court, would appear by a reference to an opinion of the same Judges in the case of the Southern Pacific Company vs. Robert S. Burke, lately decided and not yet reported, and a copy of which opinion will be submitted with this brief.

If this be the jurisprudence of the Fifth Circuit, we respectfully submit that it is contrary to the jurisprudence of this Court, and contrary to the jurisprudence of every other circuit in this union, and that this Court will use its supervisory jurisdiction for the purpose of bringing the Circuit Court of Appeals for the Fifth Circuit to a proper appreciation of its duty as a Court of law under the Constitution and laws of the United States, and to prevent a diversity of jurisprudence in the Courts of the United States.

II.

We claim that there was a gross and material error in the opinion of the majority of the Court in holding that, "the point of all and each of the plaintiff's Bills of exceptions is, that the trial Judge erred in not instructing the jury, as a matter of law, that the defendant in error was guilty of contributory negligence and could not recover."

We think we may be allowed to express a large degree of respectful surprise at this remarkable finding of the Court, because the barest inspection of the dif-

ferent Bills of Exception shows that the statement is utterly without foundation in fact or in law. This is a point which needs no argument, because it is to be settled by a comparison of the Bills themselves with the statement of the Court. We have stated the substance of the Bills in the petition, and the substance of two or three of the Bills are stated in the dissenting opinion of Judge Pardee. The Bills themselves are in the Record, attached to the petition, in order that the Court may make this inspection for themselves. We shall, therefore, assume it to be true, as charged for the purposes of argument, that the Bills of Exception are separate and distinct, that they present separate and distinct questions of law, and that the point of all and each of them is not the same as the first Bill of Exceptions, which is taken up and discussed by the Court.

We respectfully submit that it is a travesty upon justice, and upon the right of appeal, if an appellate court has the right to evade its duty of taking up and discussing errors assigned for its consideration by an unfounded and sweeping statement that all the assignments of error present only one point; and we do not believe that this Court will permit a Circuit Court of Appeals, which is a subordinate tribunal to the Honorable Court, to deny justice in this manner to a litigant. A mere inspection of the assignments of error in this

case, and the Bills of Exceptions upon which those assignments were based, shows that they were serious, material to the issue, and that error upon any one of them by the court below was error which would necessitate a reversal of the judgment and the remanding of the cause for a new trial. The appellants had the right to be heard upon these assignments. They had the right to have, under the Constitution and laws of the United States, the judgment of the appellate tribunal upon those assignments. And if this Court finds that those assignments of error were material and decisive of the issue involved, it will compel the Circuit Court of Appeals for the Fifth Circuit to perform its judicial duty as an appellate court and to pass upon the errors assigned. That Court having refused so to act, the only remedy left to the litigants is to ask this Court to use its supervisory jurisdiction and to order the Record to be sent up (to use the language of the ancient original writ of *certiorari*, as defined in Bacon's Abridgement, *verbo certiorari*, title a), "to the end that the parties may have the more sure and speedy justice" before you.

Respectfully submitted,

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